The Cypress Group

June 13, 2018

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision (CG Docket No. 18-152; CG Docket No. 02-278)

Dear Ms. Dortch,

I write on behalf of The Insurance Coalition, a group of insurance companies that share a common interest in federal regulations. In this case, we write to support the Federal Communications Commission's ("FCC") expressed interest in updating its interpretation and implementation of the Telephone Consumer Protection Act ("TCPA")[1] in order to provide companies, including those in the insurance industry, clarity on necessary engagements with consumers.

Our members rely on many methods of communications with our policyholders, including calls and text messages. We support the goal of the TCPA, which is to protect consumers from intrusive and unwanted telemarketing calls. However, in our view, the TCPA has inadvertently hindered many insurance companies from conducting consumer-friendly telemarketing -- and even non-telemarketing -- communications. In fact, there are many instances in which TCPA compliance has directly deterred day-to-day outreach to customers who want and need help navigating a complex marketplace. Our members are committed to the spirit of the TCPA and go to great lengths to comply; however, our firms and our policyholders would benefit from additional clarity on (1) how to address reassigned numbers, (2) the definition of an Automatic Telephone Dialing System ("ATDS"), (3) revocation of prior consent, and (4) statutory fines.

We appreciate the opportunity to comment and share your commitment to strong consumer protection. As insurers whose core mission is policyholder protection, we are deeply committed to maintaining engagement with consumers in a timely and efficient fashion. We also appreciate the FCC's deliberative approach, and we look forward to engaging on this matter as the rulemaking process moves forward.

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[1] Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, 83 Fed. Reg. 26284 (June 6, 2018).

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Specific Comments

I. Establish a database of reassigned cellphone numbers, adopt a safe harbor for businesses that utilize the database, and define "called party" as "intended recipient."

A. Establish a database of reassigned numbers, and for numbers not listed in the database, waive liability until a caller has actual notice of the reassignment.

Approximately 35 million numbers are "disconnected and aged" each year, and some 100,000 wireless numbers are reassigned by telecommunications carriers every day. However, there is no agency or organization that maintains a single, authoritative wireless telephone directory or reassigned phone number database, making it nearly impossible to know if the call violates the TCPA. To address this, we recommend that the FCC establish a database of reassigned cell phone numbers to improve TCPA compliance and provide clarity around consent on migrated landline to cellular numbers. For reassigned numbers not listed in the database, we suggest that liability for calling such a number not attach until the caller has actual notice that number has been reassigned.

B. Implement a safe harbor for businesses that utilize the database.

For businesses that utilize the database, we suggest the establishment of a safe harbor that requires a good-faith belief that a call does not violate TCPA, established by taking affirmative actions to check the reassigned number database.

C. Adopt a definition of "called party" that focuses on "intended recipient."

Finally, the statute carves out calls "made with the prior express consent of the called party" from its prohibitions.[2] Yet, as the public comment notice notes, the *ACA International* court vacated as arbitrary and capricious the Commission's interpretation of the term "called party" to mean the "current subscriber," and further guidance is needed on how to interpret the term.[3] We recommend adopting a definition that focuses on the "intended recipient." "Intended recipient" is one of the four interpretations of "called party" that courts have adopted and would align with Congress' intent that the statute afford a ready defense to a caller that had received consent from the person he or she was trying to call.[4]

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[2] Telephone Consumer Protection Act § 227(b), 47 U.S.C. § 227 (1991).

[3] *ACA Int'l, et al., v. Fed. Commc'n's Comm'n and U.S.,* 15-1211 D.C. Cir. 1, 39-40 (2018).

[4] *See Cellco P'ship v. Dealers Warranty, LLC,* 2010 U.S. Dist. Lexis 106719 (D.N.J. Oct. 5, 2010); *Soppet v. Enhanced Recovery Co., LLC,* 679 F.3d 637 (7th Cir. 2012); *Osorio v. State Farm Bank, F.S.B.,* 746 F.3d 1242 (11th Cir. 2014); *Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316 (3rd Cir. 2015).

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II. Interpret the definition of "Automatic Telephone Dialing System" ("ATDS") to mean "present capacity."

In light of the *ACA International* decision, we support the FCC providing clarity as to how businesses should interpret the definition of ATDS. Pursuant to the statute, the term "automatic telephone dialing system" means equipment that has "the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[5] The court in *ACA International* rejected the FCC's definition of ATDS as expansive and arbitrary, and as such, definitional clarity is still needed.[6]

We suggest the term "capacity" be interpreted to mean "present" capacity, as opposed to "potential" capacity. Present capacity means that the dialing system is presently storing or producing telephone numbers to be called, using a random or sequential number generator, and actually is being used to dial such numbers to reach consumers.

Furthermore, we believe that human intervention should render a call outside the definition of an ATDS. Congress intended an auto-dialer to encompass database dialers that continuously dial numbers, without any human involvement. The definition of ATDS, as currently construed, is so broad that it captures situations where a human, even if he or she is controlling and deciding the manner in which calls are made, is using equipment that has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers."[7] Interpreting "capacity" to mean "present capacity" coupled with actual use will ensure that only calls that are being made as Congress intended qualify as an ATDS- i.e., calls performed by database dialers that continuously dial telephone numbers, without any human intervention.

III. Clarify the definition of "any reasonable means" with respect to revocation of prior consent.

While we support the court's decision in ACA *International, et al. v. FCC* to uphold the "any reasonable means" standard, which stipulates that a consumer can opt out of calls, we also note that the court provided little guidance on what constitutes "reasonable means."[8] Too often, well-meaning companies are unable to honor requests for revocation, because they are not aware that such a request was made. This often occurs because the customer uses what they believe is a reasonable means to revoke consent,

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[5] Telephone Consumer Protection Act § 227(a), 47 U.S.C. § 227 (1991).

[6] *ACA Int'l, et al., v. Fed. Commc'n's Comm'n and U.S.,* 15-1211 D.C. Cir. 1, 29 (2018).

[7] *Id.*

[8] *ACA Int'l, et al., v. Fed. Commc'n's Comm'n and U.S.,* 15-1211 D.C. Cir. 1, 5 (2018).

unaware that such revocation failed to reach the intended recipient. To address this, we recommend that the FCC define "any reasonable means" to mean a company-implemented standard process for providing customers accessible avenues to revoke consent, while also providing clarity on what revocation method a company must provide to a consumer. This will not only provide the consumer with reassurance that their revocation will reach the intended recipient, but will also ensure that the company actually receives notice of such revocation so that it can honor it.

IV. TCPA Statutory Fines

While the proposal does not specifically ask about implementation of the TCPA's statutory fines, our members have been impacted such that we feel compelled to comment. The TCPA's open-ended damages clause has resulted in suits against legitimate businesses communicating appropriately with their customers. We appreciate FCC Chairman Pai's and Commissioner O'Rielly's previous statements on the critical need to diminish meritless TCPA suits, and we recommend that the FCC issue guidance to specify that, with respect to the TCPA, statutory fines should fit infractions.[9] This will help accomplish Chairman Pai and Commissioner O'Rielly's stated desire to reduce meritless litigation, restore focus on actual violations of TCPA, and protect existing business-consumer relationships.

V. Conclusion

We support the application of clear standards regarding how to communicate with consumers effectively and within the bounds of the law, while reducing unwanted communications. We appreciate the thoughtful process the FCC has undertaken. We appreciate the opportunity to comment and look forward to continued dialogue as the FCC develops any subsequent proposed rulemaking.

Sincerely,

Bridget Hagan
Executive Director, The Insurance Coalition

[9] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, 30 FCC Rcd 7961, 8072-8083 (dissenting statement of Commissioner A. Pai ("Pai TCPA Dissent"), 8084-8098 (dissenting statement of Commissioner M. O'Rielly) ("O'Rielly TCPA Dissent") (2015).*